IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 251

PANHANDLE EASTERN PIPE LINE COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION; MICHIGAN-WISCONSIN PIPE LINE COMPANY; CITY OF DETROIT, MICHIGAN; MICHIGAN PUBLIC SERVICE COMMISSION; NATIONAL COAL ASSOCIATION; UNITED MINE WORKERS OF AMERICA; LAKE MICHIGAN DOCKS ASSOCIATION; WISCONSIN-UPPER MICHIGAN FUEL DEALERS' ASSOCIATION; SOLID FUEL INSTITUTE OF MILWAUKEE COUNTY; THE ALTON RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF, AND MOTION TO DISPENSE WITH PRINTING OF RECORD.

ROBERT P. PATTERSON,
One Wall Street,
New York 5, New York.
JOHN S. L. YOST,
120 Broadway,
New York 5, New York.
D. H. CULTON,
Barfield Building,
Amarillo, Texas.
JOHN W. SCOTT,
HARRY S. LITTMAN,
1025 Vermont Avenue, N. W.,
Washington 5, D. C.
Counsel for Panhandle Eastern Pipe Line Company, Petitioner.

August 30, 1948.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Panhandle Eastern Pipe Line Company (herein referred to as "Panhandle") respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered June 3, 1948, affirming orders and opinions of the Federal Power

Commission under the Natural Gas Act of 1938 (52 Stat. 821; 15 U. S. C. § 717), as amended by the Act of February 7, 1942 (56 Stat. 83; 15 U. S. C. § 717(f)), issuing a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company.

OPINIONS AND ORDERS BELOW.

The opinion of the Court of Appeals for the District of Columbia (Tr. 26187) is not yet officially reported. A copy thereof appears in Appendix A, *infra*, pp. 50 to 55. The opinions and orders of the Federal Power Commission are found at pages 85-227 of the printed Petition for Review filed in the court below, which is a part of the transcript of the record in this Court. Copies of said printed petition are also separately filed as Appendix C hereto.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on June 3, 1948. (Tr. 26192). The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (52 Stat. 831; 15 U. S. C. § 717r(b)), and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. § 347(a)).

STATUTE INVOLVED.

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821; 15 U. S. C. §§ 717, *et seq.*, as amended by Act of February 7, 1942 (56 Stat. 83, 15 U. S. C. § 717f)), are set forth in Appendix B, *infra*, pp. 56 to 61.

QUESTIONS PRESENTED.

1. Whether, under the Natural Gas Act, the Federal Power Commission is authorized to grant a certificate of public convenience and necessity to Michigan-Wisconsin

Pipe Line Company ("Michigan-Wisconsin"), a proposed new supplier of natural gas to the Detroit and Ann Arbor markets, in the absence of essential findings and substantial proof that petitioner ("Panhandle"), the existing supplier, was not able and willing to supply the present and future requirements of those markets.

2. Whether the Commission may lawfully grant a certificate of public convenience and necessity to Michigan-Wisconsin in the absence of a finding or showing of financial ability to construct and operate the proposed pipe line project and in the absence of a finding or showing of a satisfactory schedule of rates.

3. Whether, even assuming, *arguendo*, that the issuance of a certificate to Michigan-Wisconsin was warranted, the Commission may cut the rights of Panhandle in its established Detroit and Ann Arbor markets to a volume of gas below that which it is delivering under validly outstanding "grandfather" and "non-grandfather" certificates issued pursuant to Section 7 of the Natural Gas Act.

4. Whether the Commission's action in pursuing a consistent course of partiality in favor of Michigan-Wisconsin as well as a predetermination to issue a certificate of public convenience and necessity to Michigan-Wisconsin constituted a denial of a fair hearing and due process to Panhandle.

STATEMENT.[1]

This case involves a review of orders of the Federal Power Commission ("Commission") issuing a certificate of public convenience and necessity authorizing Michigan-

[1] References herein are to the certified transcript of the record (Tr.), which was not printed in the court below, and to the printed Petition for Review in the court below, Appendix C hereto, which contains copies of the opinions and orders of the Federal Power Commission. Unless otherwise indicated, italics herein are supplied.

Wisconsin Pipe Line Company to construct and operate a pipe line from the Hugoton gas field in Texas to the Austin storage field in Michigan for the purpose of supplying natural gas to various communities in Wisconsin, Iowa, Missouri and Michigan. The principal market proposed to be served is the Detroit-Ann Arbor area in Michigan, whose entire natural gas supplies are now being furnished by Panhandle to Michigan Consolidated Gas Company ("Michigan Consolidated"), the local distributor. Michigan-Wisconsin and Michigan Consolidated are under single control and management (Tr. 5372-5374).

Panhandle opposed the granting of the certificate on the ground that since it has satisfactorily rendered the service to the Detroit and Ann Arbor areas contemplated and authorized by certificates of public convenience and necessity issued to it by the Commission under Section 7 of the Natural Gas Act and is willing and able to supply the additional requirements of those areas, no ground existed to displace it in those markets.

The Commission was divided, three to two, in the orders and opinions under review.

Authorization Sought by Michigan-Wisconsin Before Federal Power Commission

On September 24, 1945, Michigan-Wisconsin, a newly organized affiliate of Michigan Consolidated, filed application with the Commission for a certificate of public convenience and necessity to authorize, *inter alia*, the construction and operation of a natural gas pipe line extending from the Hugoton gas field in Texas, through Oklahoma, Kansas, Missouri, Iowa, Wisconsin, Illinois and Indiana to the Austin storage field in Michigan (Appendix C, pp. 113-114, 117-118). By means of this project, Michigan-Wisconsin proposed to supply natural gas to its affiliate, Michigan Consolidated, for distribution in Detroit,

Ann Arbor and other communities in Michigan.[2] As to Detroit and Ann Arbor, the application requested that until December 31, 1951, Michigan-Wisconsin be authorized to supply such quantities of gas as might be required in excess of 127 million cubic feet per day contemplated by the contract between Panhandle and Michigan Consolidated for Detroit and Ann Arbor; after December 31, 1951, Michigan-Wisconsin proposed to supply the entire requirements of Michigan Consolidated and completely displace Panhandle in those markets (Tr. 22548; Appendix C, pp. 122-3).

PANHANDLE'S INTEREST

Panhandle intervened in the proceedings before the Commission in opposition to the granting of a certificate (Appendix C, p. 228). Panhandle owns and operates a natural-gas pipe line system extending from the Panhandle and Hugoton gas fields in Texas, Oklahoma and Kansas to northern termini in Michigan. Gas is produced and purchased by Panhandle in those fields and transported to markets along the route of the main line in Kansas, Missouri, Illinois, Indiana, Ohio and Michigan.[3] Its largest customer is Michigan Consolidated, the distributor in the Detroit and Ann Arbor districts, which purchases 27 per cent of Panhandle's annual output and 33 per cent of its pipe line capacity on peak days (Exh. 286, Tr. 20977-8; Appendix C, pp. 165, 222, items 1-3).

Panhandle is regulated as a "natural-gas company" under the Natural Gas Act, which places on interstate natural-gas pipe line companies a comprehensive plan of

[2] Michigan-Wisconsin also proposed to supply natural gas at the city gates of Milwaukee, Madison and other communities in Wisconsin, Iowa and Missouri (Appendix C, pp. 126-7).

[3] A map showing Panhandle's present system and certain proposed additions authorized by the Commission (Group B facilities) is in evidence as Exhibit 301 (Tr. 21018).

regulation, including fixing of rates[4] (Secs. 4-5), control over construction and abandonment of facilities and service (Sec. 7), and supervision of accounts, records and depreciation (Secs. 8-10). Continuance of the service in which it was engaged on February 7, 1942 (the effective date of the amendment to Section 7(c) of the Act) was authorized by a "grandfather" certificate of public convenience and necessity issued by the Commission (Tr. 25586), and all facilities since constructed have been authorized by additional certificates (Tr. 25590-25659). In reliance on such certificates, Panhandle has invested many millions of dollars in maintaining and improving the natural-gas service to its markets, including the Detroit and Ann Arbor districts.[5]

Panhandle first brought natural gas to Detroit in 1936 pursuant to a contract, which provided for maximum deliveries of 90 million cubic feet per day (Tr. 15181; Exh. 248, Tr. 20708). In 1939 the contract was amended to increase deliveries to Detroit to 100 million cubic feet per day (Tr. 15182; Exh. 251, Tr. 20766) and in 1940, to 125 million cubic feet per day, which is the present contractual maximum (Tr. 15182; Exh. 252, Tr. 20774). The contract provides for termination, unless renewed, on December 31, 1951 (Tr. 20774).

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[4] In 1942, the Commission reduced Panhandle's rates by some $5,000,000 per year on the theory, among others, that, because of its markets, it "is exceptionally free from serious business hazards" 3 F. P. C. 273, 286 (affirmed 324 U. S. 635, 650, f.n. 9)).

[5] Over the period 1937-1946 Panhandle's property and plant account grew from $58,060,000 to $117,173,000, a substantial portion of which was for the purpose of supplying the increased requirements of the Detroit district (Tr. 15182-3). In 1940 alone, $7,500,000 were expended in constructing additional facilities for such purpose (Tr. 15322).

Estimated Sales in the Detroit and Ann Arbor Markets

Michigan-Wisconsin estimated the firm gas requirement of the Detroit and Ann Arbor districts in 1951 at 44 billion cubic feet, and the interruptible gas requirement of industries at 27 billion cubic feet, a total of 71 billion cubic feet (Exh. 224, pp. 14, 48, Tr. 20241, 20277). It estimated that in 1952 the firm sales requirement would be 44 billion cubic feet,[6] and that there would be no sales of interruptible gas to industires (Exh. 224, p. 14, line 16, Tr. 20241). However, in the closing days of the hearing, Mr. Fink, president of Michigan Consolidated, testified that, in addition to such 1952 requirement of 44 billion cubic feet, there would be a market in that year for 43 billion cubic feet of industrial gas[7] (Tr. 14290), making a total of 87 billion cubic feet in 1952 for the Detroit and Ann Arbor districts.[8]

Financing and Rates

Michigan-Wisconsin did not present any commitment for financing of the project in conformity with the Commission's consistent practice. Instead, it tendered two witnesses who testified that any prediction respecting Michigan-Wisconsin's ability to finance the project two

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[6] The estimate of 44 billion cubic feet includes 10 billion cubic feet of firm gas sales to industries (Exh. 224, p. 14, line 10, Tr. 20241; Exh. 224, p. 48, line 8, Tr. 20277).

[7] This 43 billion included the 27 billion cubic feet shown as interruptible sales in 1941 plus sales to two large industrial customers who had recently requested an aggregate of 16½ billion cubic feet (Tr. 14288-14291).

[8] Because of his belief that the gas shown as interruptible gas in 1951 could be "firmed up" in 1952, and his desire to make sales in that year to the two industrial customers, he, on October 31, 1946, for the first time expressed a willingness to purchase gas from Panhandle. The reason assigned was that the supply available from Michigan-Wisconsin would be inadequate to supply such revised requirements by 32 billion cubic feet (Tr. 14288-14291).

years from the date of their testimony (more than two years have since elapsed) would be a "mere guess." (Tr. 7257-7266, 7311-7328, 13496-7, 13477, 13506). No substantial evidence was offered that Michigan-Wisconsin had financial ability to construct the proposed project, and the Commission did not enter any finding of financial ability.

With respect to proposed rate schedules submitted in evidence by Michigan-Wisconsin, the Commission refused to accept them as satisfactory (Appendix C, pp. 132-134). In view of this failure of proof, the Commission provided in its certificate order that the facilities shall not be used for the transportation and sale of natural gas unless there will be submitted at some indefinite time in the future a "schedule of rates and charges in a form satisfactory to this Commission, providing for adequate and reasonable rates and charges consistent with the public interest" (Appendix C, pp. 90-91, 227).

Panhandle's Deliveries to Detroit and Ann Arbor

Panhandle presented evidence respecting its own ability and willingness to supply the entire natural gas requirements of its established markets in the Detroit and Ann Arbor districts. Moreover, it offered evidence in support of its pending applications to install additional facilities for the service of these and its other markets. This evidence disclosed that over the period 1937-1945 there was available to Michigan Consolidated for the Detroit district under its contract with Panhandle 363 billion cubic feet, of which Michigan Consolidated took a total of only 217 billion cubic feet, or 59 per cent, as shown in the following tabulation (Tr. 14067-14070; Exh. 253, Tr. 20780):

	Gas Available from Panhandle to Michigan Consolidated (Million cubic feet)	Volume Taken by Michigan Consolidatel (Million cubic feet)	Volume Not Taken by Michigan Consolidated (Million cubic feet)
1937	32,850	15,969	16,880
1938	32,850	16,032	16,817
1939	32,850	18,364	14,485
1940	36,775	21,976	14,789
1941	45,625	23,698	21,926
1942	45,625	26,315	19,309
1943	45,625	31,278	14,346
1944	45,750	31,520	14,229
1945	45,625	32,089	13,535
Total	363,575	217,241	146,316

Prior to December, 1945, with the single exception of 1941, Michigan Consolidated failed to take even on peak days the maximum daily quantities (125 million cubic feet) available to it under the contract for Detroit (Exh. 253, Tr. 20780). As for the Ann Arbor district, the evidence showed that Michigan Consolidated also failed to take the quantities of gas available to it under contract with Panhandle. The contractual volumes available were 2 million cubic feet per day, or 730 million cubic feet per year (Exh. 267, Tr. 20824). Yet only 400 to 450 million cubic feet per year were taken during the four year period 1942-1945 (Appendix C, p. 104).

The Commission conceded that Panhandle *"has reasonably met its contractual obligations to supply natural gas to Michigan Consolidated Gas Company for resale within its Ann Arbor and Detroit, Michigan, distribution areas"* (Appendix C, p. 86).

Panhandle's Expansion Program

During the war Panhandle could not increase its capacity or deliver additional gas to its markets unless ordered to do so by the War Production Board (Tr. 15186, 15192-3).

Moreover, the critical steel shortage during and following the war prevented Panhandle and every other natural-gas company throughout the country from keeping abreast of the sharply increasing demands of their markets (Appendix C, pp. 146, 123-4). At the close of the war, the rated capacity of Panhandle's system was 383 million cubic feet daily (Exh. 300, Tr. 21009).

Anticipating post-war increases in market demands, Panhandle made plans during the war for the construction of a third parallel line and the installation of additional compressor facilities. The engineering design of this project was completed by early fall of 1945 (Tr. 5761). The construction program was divided into four steps, called "Group A, B, C and D" facilities, which will add to the present daily capacity of the system as follows (Tr. 5761-5765; Exh. 300, Tr. 21009-17):

Facilities	Rated Daily Capacity[9]
At end of war	383 million cubic feet
Group A	10 million cubic feet
Group B	80 million cubic feet
Group C	106 million cubic feet
Group D	145 million cubic feet
Total	724 million cubic feet

Certificates for the "A", "B" and "C" facilities of Panhandle have been issued by the Commission (Tr. 25654, 25659).[10]

The testimony of officials of Panhandle made it clear that Panhandle intends to apply for authority to construct the "D" facilities as and when needed for service of its

[9] The practical operating capacity exceeds substantially these theoretical rated capacities (Tr. 10496, 10552, 10557).

[10] The "C" facilities were authorized by order of June 10, 1948, *Re Panhandle Eastern Pipe Line Company*, Docket No. G-876, seven days after the court below entered its judgment affirming the orders of the FPC in the case at bar.

customers (Tr. 15205, 10205-6, 10440). Panhandle's vice-president and chief engineer testified that further increases in line capacity would result in a comparable increase in Panhandle's service to Detroit (Tr. 5772).

The Chairman of Panhandle's Board, by letter of August 15, 1946, to Michigan Consolidated formally offered to amend the existing contract to provide for additional deliveries of 2½ million cubic feet daily upon completion of the "A" facilities and another 25 million cubic feet daily upon completion of the "B" facilities, such amendment to contemplate the development of Michigan Consolidated's Austin storage field for the storage of Panhandle's gas and the extension of the term of the existing contract for 15 years (Exh. 496, Tr. 22061). However, Michigan Consolidated did not accept this offer, stating that it intended to rely upon the proposed pipe line of its affiliate, Michigan-Wisconsin, to meet "all of our requirements" (Exh. 497, Tr. 22063-4).

ADEQUACY OF PANHANDLE'S PROGRAM

As shown above, the highest estimated requirement of the Detroit and Ann Arbor districts for the year 1952 was 87 billion cubic feet, and, upon the completion of the "D" facilities, the rated capacity of the Panhandle system will be 724 million cubic feet per day, or a total of 264 billion cubic feet per year (724 x 365 days). Mr. Burnham, vice-president of Panhandle, testified that increases in capacity would result in "a *comparable* increase" in the service to Detroit (Tr. 5772). Since Panhandle's service to the markets of Michigan Consolidated (127 million cubic feet per day) represents 33 per cent of its total rated system capacity (383 million cubic feet per day), Michigan Consolidated will receive 33 per cent of the total capacity available upon completion of the "D" facilities (724 million cubic feet per day) or a total of 239 million cubic feet per day. This represents 87 billion cubic feet per year

(239 x 365 days), which is sufficient to meet the maximum estimated requirement of 87 billion cubic feet for Detroit and Ann Arbor in 1952 (See discussion in Commissioner Olds' dissenting opinion, at pages 165-8 and 204-7 of Appendix C).

Moreover, such program will also provide adequate additional gas for Panhandle's other markets, as shown by the following tabulation:

	Annual Volume
Gas available on completion of "D" facilities	264 billion cubic feet
Detroit and Ann Arbor markets in 1952	87 billion cubic feet
Gas available to other markets	177 billion cubic feet
Less amount delivered to other markets in 1945[11]	88 billion cubic feet
Additional gas available to other markets	89 billion cubic feet

Thus, upon the completion of the "D" facilities, there will be available for Panhandle's markets outside Detroit and Ann Arbor twice as much gas as was delivered to such markets in 1945.

THE COMMISSION'S ORDERS AND OPINIONS

By order dated November 30, 1946, a bare majority of the Commission (Commissioners Olds and Draper vigorously dissenting) purported to issue a certificate to Michigan-Wisconsin authorizing the construction and opera-

[11] Total Panhandle system sales in 1945 (Exh. 286, Tr. 20977) ..... 120 billion cu. ft.
Panhandle sales to Detroit and Ann Arbor in 1945 (Exh. 224, Tr. 20241, 20277) ..... 32 billion cu. ft.
Sales to other markets in 1945 .... 88 billion cu. ft.

tion of the proposed "initial" project (Appendix C, pp. 85, 118).

The majority found that necessary approvals had not not been obtained from the Securities and Exchange Commission, "without which the project can neither be financed, constructed, nor operated" (Appendix C, pp. 86-7). They also found that Michigan-Wisconsin had failed to apply to the FPC for certain necessary authorizations required by the Act and had submitted unsatisfactory rate structures (Appendix C, p. 87). They found, moreover, that since Panhandle had met its contractual obligations and had expressed a willingness to meet the enlarged requirements of the Detroit and Ann Arbor markets, Panhandle is "entitled to reasonable protection in the service of these markets and to an opportunity to participate in their growth" (Appendix C, p. 86). Nevertheless, the Commission authorized Michigan-Wisconsin to supply said markets. Additionally, the order was conditioned, *inter alia,* as follows (Appendix C, pp. 89-91):

> (1) That Michigan-Wisconsin shall obtain approval of its proposed plan of financing by the Securities and Exchange Commission.
>
> (2) That Michigan-Wisconsin shall submit to the Commission a schedule of rates and charges in a form satisfactory to the Commission providing for adequate and reasonable rates and charges consistent with the public interest.[12]
>
> (3) That the facilities shall not be used for the transportation for or sale of gas to Michigan Consolidated for resale in Detroit and Ann Arbor "except with due regard to the rights and duties of Panhandle

[12] As modified by order of March 6, 1947 (Appendix C, p. 224, par. 4).

> Eastern in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act;" and such rights and duties shall be determined by supplemental order to be issued within 15 days thereafter.

Dissenting Commissioner Draper held that the finding of the majority, that Michigan-Wisconsin was able properly to do the acts and to perform the service proposed, was not supported by substantial evidence, and that the Commission was without authority under the Act to grant the certificate conditioned upon a future showing of such ability (Appendix C, pp. 176-8).

No finding was made that Michigan-Wisconsin had the financial ability to construct and operate the proposed project *or that such project offered any advantages over Panhandle by way of lower rates or better service.* Nor did the Commission find that Michigan-Wisconsin could bring additional gas to the Detroit and Ann Arbor districts any sooner than Panhandle.

On February 7, 1947, the majority of the Commission issued Opinion No. 147, in which they undertook to justify their Certificate order of November 30, 1946 (Appendix C, pp. 113-158). *Commissioners Olds and Draper vigorously dissented in separate opinions* (Appendix C, pp. 159-173; 174-178.

Finally, on March 12, 1947, the majority of the Commission handed down Supplemental Opinion No. 147-A and accompanying Order (Appendix C, pp. 179, 200), *in which they adopted as the maximum measure of Panhandle's rights in the Detroit and Ann Arbor districts precisely what Michigan-Wisconsin had offered to Panhandle in a proposed contract, namely the so-called "opportunity" to sell 32 billion cubic feet per year to Michigan Consoli-*

dated.[13] *Commissioners Olds and Draper again dissented* (Appendix C, pp. 201, 202).

Timely applications for rehearing as to each of the above orders were filed with the Commission (Tr. 25211, 25247, 25299, 25498). These were denied either by order (Appendix C, p. 109) or by non-action of the Commission (Section 19(a)). Thereafter, on July 2, 1947, Panhandle filed in the United States Court of Appeals for the District of Columbia its petition to review and set aside each of said orders and opinions.

THE OPINION BELOW

On June 3, 1948, the Court below handed down its opinion affirming the orders of the Commission. (A copy of the opinion of the court is reprinted in Appendix A hereto, *infra*, pp. 50-55). The opinion of the court consisted of a summary disposition of the case with only scant discussion of the matters involved and issues presented by the petition for review.

REASONS FOR GRANTING THE WRIT.

1. The United States Court of Appeals for the District of Columbia has decided questions of general importance and of substance relating to the construction and application of a statute of the United States (the Natural Gas Act), which have not been, but should be, settled by this Court.

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[13] Said order provided that Panhandle shall be "afforded reasonable opportunity to deliver and sell to Michigan Consolidated not less than the annual volumes of gas delivered and sold by it [Panhandle] for either the years 1942 or 1945 or the average delivered for the five-year period 1942 through 1946" (Appendix C, pp. 200-201). The 5-year average amounts to approximately 32 billion cubic feet per year (Appendix C, pp. 104, 197).

2. The United States Court of Appeals for the District of Columbia has not given proper effect to applicable decisions of this Court.

3. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Federal Power Commission, as to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, stated more fully and supported by argument in the attached brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT P. PATTERSON,
One Wall Street,
New York 5, New York.

JOHN S. L. YOST,
120 Broadway,
New York 5, New York.

D. H. CULTON,
Barfield Building,
Amarillo, Texas.

JOHN W. SCOTT,
HARRY S. LITTMAN,
1025 Vermont Avenue, N. W.,
Washington 5, D. C.
Counsel for Panhandle Eastern Pipe Line Company, Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS AND ORDERS BELOW.

Reference to the opinions and orders below is made in the petition, page 2.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked are shown in the petition, page 2.

III.

STATEMENT OF THE CASE.

This appears in the petition, pages 3 to 15.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, pages 2 to 3, under the heading "Questions Presented."

V.

ARGUMENT.[14]

1. The United States Court of Appeals for the District of Columbia Has Decided Questions of General Importance and of Substance Relating to the Construction and Application of a Statute of the United States (the Natural Gas Act), Which Have Not Been, But Should Be, Settled by This Court.

This case is one of great public significance. The vital issue underlying the main questions presented is whether the Federal Power Commission is authorized by the Natural Gas Act to oust petitioner ("Panhandle"), a duly certificated natural-gas company, from a substantial portion of its established markets by issuing a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company ("Michigan-Wisconsin"), a proposed new pipe line supplier, in the absence of essential findings and

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[14] References herein are to the certified transcript of the record (Tr.), which was not printed in the court below, and to the printed Petition for Review in the court below, Appendix C hereto, which contains copies of the opinions and orders of the Federal Power Commission. Unless otherwise indicated, italics herein are supplied.

proof that Panhandle, the existing natural-gas company, was not able and willing to supply the present and future requirements of those markets.

The questions presented herein have not been passed upon by this Court. A decision thereon is of the utmost importance not only in the administration of the Natural Gas Act,[15] but also in the general field of public utility regulation—to public utility regulatory bodies throughout the nation, to "natural-gas" companies subject to said Act,[16] and to countless consumers of natural gas. In passing upon these questions, the Federal Power Commission divided 3 to 2, being unable to agree upon the proper interpretation of Section 7 of the Natural Gas Act, as amended, as applied to the facts at bar. The correct meaning and application of the pertinent provisions of that statute are matters which only this Court can finally resolve, and which in the public interest should be resolved. Moreover, in our view, the decision of the Commission and the court below on several of the basic questions presented is in conflict with the decisions of this Court.

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[15] The book cost of gas plant of natural-gas companies subject to the jurisdiction of the Federal Power Commission, on December 31, 1946, aggregated $2,105,985,000, and their outstanding long-term debt amounted to $886,864,000 (Twenty-seventh Annual Report of the Federal Power Commission, 1947, p. 22).

[16] From February 7, 1942, the effective date of the amendment to Section 7 of the Natural Gas Act, to October 15, 1946, 319 applications for certificates of public convenience and necessity (other than "grandfather" applications) were filed with the Commission seeking authority to construct, acquire and operate facilities having an estimated cost of over $1,300,000,000. (Federal Power Commission Staff Report entitled "Administration of the Certificate Provisions of Section 7 of the Natural Gas Act", dated January, 1947, in Docket No. G-580, pp. 7-8). As of the beginning of 1947, 109 applications involving $517,000,000 of facilities were pending; and during the year, 156 applications were filed involving $673,000,000. (1947 Annual Report, *supra*, p. 96).

A. The Commission and Court below departed from the established rule of law that a certificate will not be issued to a proposed new supplier of public utility service where there is existing service, unless it is inadequate and unless the present suplier has been given an opportunity to furnish such additional service as may be required.

The necessity for substantial proof and findings with respect to inadequacy of existing service before a newcomer will be permitted to enter the markets of an existing utility is so well established in the law as to be considered implicit in the term "public convenience and necessity."[17] It is equally well settled that a certificate will not be granted unless the present supplier has been first given an opportunity to furnish such additional service as may be required.

See collection of cases and discussion of rule in 67 American Law Reports, p. 957 (1930);

Ford P. Hall, "Certificates of Public Convenience and Necessity," 28 Michigan Law Review, 107, 283-286;

3 Pond, Public Utilities (4th ed., 1932) pp. 1440, 1554;

37 American Jurisprudence § 12, p. 530;

David E. Lilienthal and Irwin S. Rosenbaum, "Motor Carrier Regulation by Certificates of Public Convenience and Necessity," 36 Yale Law Journal 163, 167, 184-5 (1926).

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[17] See e.g. statement of general rule by Mr. Justice Douglas, dissenting (in which Justices Black and Rutledge concurred) in *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 74. The majority of the Court expressed no disagreement with the general rule. Also see *Mackay Radio & Telegraph Co.* v. *Federal Communications Commission*, 68 U. S. App. D. C 336, 338, 97 F. 2d 641.

Decisions of state courts supporting this proposition are legion.[18] It is also to be noted that the Interstate Commerce Commission in its administration of the Motor Carrier Act has given priority to the existing carrier where additional service is required.[19]

The Commission and court below departed from these principles of law and ignored the legislative history which makes clear that Congress, in enacting amendatory Section 7 of the Natural Gas Act, abandoned the concept of unlimited competition in the natural gas pipe-line field as it had done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition and the regulation of rates, among other measures.[20] It was the announced policy of the Act to protect existing natural-gas companies by preventing "uneconomic extensions" and "economic waste" in the construction of interstate pipe lines. H. Rept. No. 1290,

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[18] *Arizona Corporation Commission* v. *Hopkins*, 52 Arizona 174, 79 P. (2d) 946; *West* v. *Williams*, 166 Md. 277, 170 Atl. 517; *Eldridge* v. *Fort Worth Transit Co.*, 136 S. W. (2d) 955 (Texas Civ. App.); *Missouri Pacific R. Co.* v. *Williams*, 201 Ark. 895, 148 S. W. (2d) 644; *Seaboard Air Line R. Co.* v. *Wells*, 100 Fla. 1027, 113 So. 587; *Vander Werf* v. *Board of Railroad Commissioners*, 237 N. W. 909 (N. D.); *Tri-State Transit Co.* v. *Dixie Greyhound Lines*, 19 So. (2d) 441 (Miss.); *Stark Electric Railroad Co.* v. *Public Utilities Commission of Ohio*, 118 Ohio St. 405, 161 N. E. 208; *Columbus D. & M. Electric Co.* v. *Public Utilities Commission of Ohio*, 116 Ohio St. 92, 155 N. E. 646; *Egyptian Transportation System* v. *L. & N. Ry. Co.*, 321 Ill. 580, 152 N. E. 510; *Chicago & West Towns Railways Co.* v. *Commerce Commission*, 383 Ill. 20, 48 N. E. (2d) 320.

[19] 1 M. C. C. 329; 1 M. C. C. 713, 1 M. C. C. 717; 2 M. C. C. 263; 20 M. C. C. 143; 20 M. C. C. 386.

[20] See *Mackay Radio & Telegraph Co.* v. *Federal Communications Commisson*, 68 U. S. App. D. C. 336, 338, 97 F. 2d 641; *Federal Communications Commission* v. *Sanders Bros.*, 309 U. S. 470, 474; *Texas & Pacific Ry.* v. *Gulf Railway*, 270 U. S. 266, 277.

Committee on Interstate and Foreign Commerce, 77th Congress, 1st Session, pp. 2-3. Since Section 7, as amended, was patterned after the certificate provisions of the Motor Carrier Act of 1935,[21] decisions under that Act cast light upon the meaning of the provisions of Section 7 and the significance of certificates issued thereunder. Moreover, the term "public convenience and necessity" was intended by Congress to be accorded the usual meaning as interpreted by the Courts.[22] *I. C. C.* v. *Parker,* 326 U. S. 60, 65. This Court has held that the certificate provisions of the Motor Carrier Act should be liberally construed to preserve the position which carriers have struggled to maintain in the national transportation system. *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 488, 489; *United States* v. *Maher,* 307 U. S. 148, 153, 154. Also see *Crescent Express Lines, Inc.* v. *United States,* 49 F. Supp. 92, 94, 95 (affirmed, 320 U. S. 401); *Noble* v. *United States,* 45 F. Supp. 793, 799 (affirmed, 319 U. S. 88).[23]

The Commission's departure from settled legal principles in the case at bar was aptly epitomized by dissenting Commissioner Olds as follows:

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[21] Report No. 1290 of House Committee on Interstate and Foreign Commerce, 77th Congress, 1st Session, pp. 2-3; Hearings before said House Committee on H. R. 5249, p. 82. See Section 206 (a) of the Motor Carrier Act, 49 U. S. C., § 306 (a).

[22] Senator Wheeler, in charge of the bill which became the Motor Carrier Act, referred during the debates in the Senate to the term "public convenience and necessity," stating: "But those words have been adopted by almost every State in the Union where there is a law, they have been interpreted by the courts, and the committee felt that, while perhaps some other language might have been just as appropriate, nevertheless, that language having been construed by the courts, it would be unwise for the committee to write some other language in the law which would have to be passed upon by the courts." Congressional Record, Vol. 79, pt. 5, p. 5653 (74th Congress, 1st Session).

[23] Cf. *Inland Motor Freight* v. *United States,* 60 F. Supp. 520, 524.

"* * * I am convinced that good service in the public interest requires assurance to an existing supplier that, so long as it is able and willing to provide adequate service at reasonable rates, its markets shall not be turned over, in whole or in part, to another. I think that is good utility law and administration because it produces sound results, i. e., places the maximum, undivided responsibility on the established company.

"Furthermore, I think that was the intention of Congress, when it amended Section 7 of the Natural Gas Act, providing, among other things for the automatic granting of so-called 'grandfather' certificates to existing companies for their operations as of February 7, 1942. I am sure it wanted to protect such companies in their markets so long as they lived up to their obligations. And I feel certain that Congress could hardly have expected that this assurance would be so soon impaired in the case of a company doing a reasonably satisfactory job.

"In the instant case the record contains no substantial showing of failure or unwillingness on the part of Panhandle Eastern to carry this responsibility. Therefore, on the record, Panhandle Eastern is entitled to supply gas to the Michigan Consolidated Gas Company's Detroit and Ann Arbor markets to the extent requiring the full use of the capacity of facilities for which this Commission has issued certificates and, in addition, to the first opportunity to supply the expanding needs of these markets." (Appendix C, p. 159).

Dissenting Commissioner Draper concurred in this view, and added:

"* * * It is my firm conviction that where the situation is as it is in the present proceeding, in the absence of a clear showing by a prospective competitor (the applicant, Michigan-Wisconsin Pipe Line Company) that it is in a position to render more adequate and satisfactory service than that being rendered by the existing supplier of the area involved, at just and reasonable rates, then the application must be denied inasmuch as the public interest would in no way be benefited by authorization of a second pipe line, either

by better service or by lower rates. * * *". (Appendix C, p. 174.)

The court below erroneously held that it was "unnecessary" for the Commission to require proof and make findings of unwillingness and inability on the part of Panhandle to supply the present and future requirements of its established markets before issuing a certificate to Michigan-Wisconsin, the proposed new supplier (p. 54, *infra*). It also erred in holding that the Natural Gas Act conferred no "privilege" or priority upon Panhandle to furnish an increased supply in those markets (p. 54, *infra*). *In other words, the lower court decided that the Commission was free to issue as many certificates to newcomers as it desired for the purpose of fostering "competition"* (p. 52, *infra*). We submit that this concept flies squarely in the teeth of the legislative history of amendatory Section 7, which clearly discloses the intent of Congress to prevent "uneconomic extensions" and "economic waste" in the construction of new interstate pipe lines. H. Rept. No. 1290, Committee on Interstate and Foreign Commerce, 77th Congress, 1st Session, pp. 2-3. It ignores the "grandfather" provisions of Section 7(c), as amended. And it runs counter to the usual and accepted meaning of "public convenience and necessity" as heretofore established by the decisions of the courts and regulatory bodies throughout the history of public utility regulation.

Moreover, the lower court clearly erred in holding that Section 7(g), which provides that "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company," "specifically negatives" the idea that existing natural-gas companies are entitled to any priority in the service of their markets (p. 54, *infra*). Such holding is inconsonant with

the legislative history, which discloses that subsection 7(g) was "a saving clause inserted solely to make clear that the Commission will not be deprived of authority, *in a proper case,* to issue certificates for extensions to serve an area already being served by another natural-gas company." H. Rept. 1290, Committee on Foreign and Interstate Commerce, 77th Congress, 1st Session, p. 4. The lower court fell into the error of reading "*proper case*" as "*any case.*" It, therefore, did not stop to inquire, as required by the Act, whether the facts in the case at bar presented a *proper case* for the issuance of a certificate to a newcomer to enter the established markets of Panhandle. This construction of the Act by the lower court was erroneous and tantamount to a denial to Panhandle of the review to which it was lawfully entitled.

Notwithstanding the fact that the Commission itself conceded that Panhandle was willing to supply the present and future requirements of the Detroit and Ann Arbor markets (Appendix C, p. 86), and notwithstanding the failure of the Commission to specify any respects in which Panhandle was "unable" to supply said markets, the court below held that findings of unwillingness and inability, supported by proof, had been made (p. 54, *infra*). The Commission's opinions, however, do not disclose the basis for this conclusion. We have searched the record and the opinions and orders of the Commission in vain for any such findings and proof, aside from the bare conclusion that Panhandle has not "demonstrated its ability to serve adequately the needs of these markets." (p. 52, *infra*). Significantly this statement is unsupported in the record. No findings were entered, nor would the evidence sustain any findings, of financial inability or lack of gas reserves on the part of Panhandle.[24] We are, therefore, left com-

[24] Panhandle's financial statements in evidence showed assets of $128,500,000, capital and surplus of $51,400,000, and cash or cash equivalent of $13,387,000, as compared with

pletely in the dark respecting what inability the Commission and court had in mind other than Panhandle's inability to obtain immediate deliveries of steel pipe (Appendix C, p. 146). But even the Commission conceded that the steel shortage is not peculiar to Panhandle and is being severely felt throughout the entire natural-gas industry (Appendix C, p. 146), making it impossible even to predict when the Michigan-Wisconsin project can be completed (Appendix C, pp. 123-4). In this regard, it is noted that the Commission could not find that the new project of Michigan-Wisconsin would provide any additional gas for the Detroit and Ann Arbor areas any sooner than Panhandle. (Appendix C, pp. 123-4; also see comments of dissenting Commissioner Olds at pp. 202-3 of Appendix C). Ironically enough, however, this did not deter the Commission from finding that Michigan-Wisconsin was able to perform the service proposed.

The court below and the Commission further incorrectly held that Panhandle had not applied for sufficient facilities to serve adequately the needs of the Detroit and Ann Arbor markets in addition to the expanding requirements of its other markets (p. 52, *infra*). Apart from the fact that Panhandle denies that such finding is supported by substantial evidence, the conclusion reveals a basic fallacy in reasoning. The asserted failure on the part of Panhandle to apply for additional facilities cannot be made a valid basis for issuing a certificate to a newcomer where, as in the case at bar, the holding company

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Michigan-Wisconsin's assets of $251,000 and capital stock of $315,000 (Exhs. 320, 321, 436, Tr. 21037, 21807, 15205, 21037, 21908). Panhandle's gas reserves are the largest of the natural-gas companies deriving their gas supplies from the Panhandle and Hugoton fields. See the FPC's comments concerning Panhandle's strong financial position, 3 F. P. C. 273, 286. Affirmed *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635, 649-650.

of the distributor in the Detroit and Ann Arbor district had decided as early as 1942 to build it own pipe line and, therefore, had consistently refused to negotiate with Panhandle for additional gas (Tr. 14380, 13269, 14368-9). In October, 1945, Michigan Consolidated announced that the plan for the new pipe line had "closed the door" to further negotiations with Panhandle for additional gas (Tr. 13304).[25] In the circumstances, it was not incumbent on Panhandle to apply for facilities to supply additional gas which the distributor did not want from Panhandle, particularly in the face of the impending new line (See comment by dissenting Commissioner Olds at pp. 161-2 of Appendix C).

In the Statement in the attached petition (pp. 9-12, *supra*), there is summarized the evidence showing the adequacy of Panhandle's applications for new facilities and its construction program and its willingness to supply all additional gas required in the Detroit and Ann Arbor markets. In order to avoid repetition, reference thereto is made. There is no question concerning Panhandle's willingness to supply the additional needs, since the Commission affirmatively found that Panhandle has "met its contractual obligations" and has "expressed a willingness to meet the enlarged requirements of said local markets." (Appendix C, p. 86.) Commissioner Olds in his dissenting opinion (concurred in by Commissioner Draper), conclusively demonstrated, with annotations to the record and with the aid of the Commission's technical staff, that Panhandle's applications and construction program were more

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[25] Requests for additional gas prior to 1945, during the war, when additional capacity could not be installed unless ordered by the War Production Board, were shown to be patently insincere and designed for the purpose of making a record in support of the new pipe line (Tr. 13283, 13287-8). Mr. Fink, president of Michigan Consolidated, conceded that as late as June 22, 1945, there was no refusal by Panhandle to negotiate for additional gas (Tr. 13303).

than adequate to meet the estimated requirements (Appendix C, pp. 165-8, 204-9, 221-5). In this regard, it is noted that such estimates were greatly inflated by unprecedented and fantastic forecasts of sales to industries.[26]

In affirming the orders of the Commission the court below erroneously relied upon the Commission's finding that the granting of the certificate to Michigan-Wisconsin

> "'* * * will result in competition there, [in the Detroit-Ann Arbor area] and will also make 'available to the Michigan market an alternative service and supply of natural gas from the area of the largest gas reserves in the United States. * * * ' " (p. 52, *infra.*)

Apart from the fact that no competition can result from the granting of the certificate, since Michigan-Wisconsin (the proposed new pipe line supplier) and Michigan Consolidated (the distributor of gas in the Detroit-Ann Arbor area) are under common control,[27] there is no basis in law for issuing a certificate for the purpose of creating competition. *Mackay Radio & Telegraph Co.* v. *Federal*

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[26] Dissenting Commissioner Olds stated (pp. 170-171 of Appendix C):

> "* * * I do not believe it in the public interest to authorize a new line, into the established market of an existing company, when the evidence shows clearly that its justification rests not on orderly growth of the general market but on intensive efforts to expand industrial use through conversion of large industrial plants, including boiler installations, to natural gas.
>
> "To the extent that this is true, it means that the Commission is here authorizing new pipe line capacity to provide gas primarily for expansion of industrial use 1,200 miles from the source of supply, rather than for expansion of general service with expansion of industrial use only incidental thereto. I am convinced that if such a step is to be considered sufficient time should be taken for a full exploration of its consequences."

[27] It is naive to believe that Michigan Consolidated will not purchase all the gas which its affiliate, Michigan-Wisconsin, can supply.

Communications Commission, 68 U. S. App. D. C. 336, 338, 97 F. 2d 641, 643.

Moreover, there is no basis in the record for the finding of any advantage by reason of an alternative *source* of supply, since Michigan-Wisconsin proposes to secure its gas supplies from the same source from which Panhandle is presently supplying gas, namely, the Hugoton gas field (Appendix C, p. 129). There was no finding that Panhandle's gas reserves in that field were inadequate to meet all the present and future demands of its markets. Nor would the record support such a finding, since the uncontradicted evidence shows that Panhandle controls over 700,000 proven acres in the Panhandle and Hugoton fields and some 300,000 acres on the outskirts of the assumed limits of those fields, which acreage contains recoverable reserves in excess of 5 trillion cubic feet (Tr. 15210-15211, 5505-5523; Exh. 274, Tr. 20882).

B. The Commission and Court below erred in holding that a certificate of public convenience and necessity may be issued to Michigan-Wisconsin in the absence of substantial evidence and essential findings to support the conclusion that Michigan-Wisconsin was able properly to perform the service proposed within the meaning of Section 7(e) of the Natural Gas Act.

Section 7(e) of the Natural Gas Act requires proof and finding that "applicant *is* able and willing properly to do the acts and to perform the service proposed" before a certificate of public convenience and necessity may be issued authorizing the construction and operation of an interstate natural-gas pipe line. The Commission entered such ultimate finding in the statutory language (Appendix C, p. 87). However, it failed to make essential or basic findings in this regard, since the evidence in fact showed that Michigan-Wisconsin was not able properly to do the acts and perform the service proposed. This is crystal

clear from the character of the conditions imposed in the certificate, as hereinafter shown.

The court below erroneously held that the bare ultimate conclusion as to ability, stated by the Commission in the language of the statute, was sufficient. (p. 53, *infra*). That such a conclusion, in the absence of basic findings to support it, is not enough, has been settled by this Court in *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 532-533.

The Commission failed to find that Michigan-Wisconsin was or would be able to finance the project (See Appendix C, pp. 138-140). That a finding of ability to finance is a necessary prerequisite to the issuance of a certificate is clear from the legislative history,[28] and the Commission's rules [29] and decisions.[30]

Michigan-Wisconsin submitted no financing commitment. Its financial statement showed cash on hand of only $11,681, an indebtedness of $245,922 to its holding companies, and total outstanding stock of $315,000 (Exh. 436, Tr. 21807). As Commissioner Draper pointed out in his separate dissenting opinion, there is no proof in the record of assurance of availability of adequate financial resources with which to construct the project, and in the absence of such proof, the application should have been denied (Appendix C, p. 177).

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[28] H. Rept. No. 1290, Committee on Interstate and Foreign Commerce, 77th Congress, 1st Session, pp. 2-3; Hearings on H. R. 5249, Committee on Interstate and Foreign Commerce, 77th Congress, 1st Session, pp. 5-6, 81-2.

[29] General Rules, Including Rules of Practice and Procedure, § 157.5 (g) (2), § 157.6, Exh. G-2, 12 F. R. 8601, 8602.

[30] In all prior "non-grandfather" certificate cases decided by the Commission, applicants were required to submit a firm commitment for financing before a certificate was granted: 2 F. P. C., 3 F. P. C., 4 F. P. C. and 5 F. P. C. See e.g. *Kansas Pipe Line & Gas Co., et al.,* 2 F. P. C. 29, 52-53, 58; *Tennessee Gas and Transmission Company,* 3 F. P. C. 442, 446.

As a substitute for the required finding of financial ability, which could not be made on the basis of the record, the Commission conditioned the certificate upon the approval of the proposed plan of financing by the Securities and Exchange Commission (Appendix C, p. 89. par. (B) (iii).[31] In an effort to explain their conduct in thus favoring Michigan-Wisconsin over all other applicants who had appeared before them, the Commission stated that Rule U-50 of the S. E. C. requiring competitive bidding on the issuance of securities by subsidiaries of holding companies, would prevent any banking or underwriting syndicate from making a firm advance commitment (Appendix C, pp. 139-140).

As to this there are at least two complete answers:

1. As pointed out above, the Commission made no finding or ability on the part of Michigan-Wisconsin to finance the project. Moreover, no findings were entered respecting the propriety or feasibility of the proposed plan of financing. No rule of the S. E. C. or any other agency could relieve the Federal Power Commission from performing the duty imposed upon it by Congress to inquire into and *determine for itself, in advance of the issuance of the certificate,* the soundness of the proposed financing plan and the ability of the applicant to carry it through. This is apparent from the report of the Committee recommending the passage of the amendment to Section 7, which states (at pp. 2-3):[32]

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[31] Although the S. E. C. has since approved the investment by American Light & Traction Company (the parent company of Michigan-Wisconsin) of $25,000,000 in the common stock of Michigan-Wisconsin for the purpose of the partial equity financing of the pipe line project having an estimated cost of over $126,000,000, that Commission has not approved any senior financing. In fact, no application therefor has yet been made to the S. E. C. *The United Light and Power Company, et al.,* — S. E. C. —, Holding Company Act Release No. 7591, December 31, 1947 (Tr. 25969-26015)

[32] H. Rept. 1290, Committee on Interstate and Foreign Commerce, 77th Congress, 1st Session, pp. 2-3.

"Obviously adequate regulation of such pipe lines when constructed requires that the Commission [F. P. C.] also have jurisdiction to regulate construction and *initial financing.* * * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the *financial set-up* * * * in connection with the proposed construction or extension *at a time when such vital matters can readily be modified as the public interest may demand.*"

2. S. E. C. Rule U-50 by its terms did not prevent Michigan-Wisconsin from entering into a firm or contingent commitment with a prospective buyer of its securities under which the latter would agree to bid for the securities at specified prices and rates. Nor did said rule prohibit any one from entering into a firm commitment to finance the project, subject, however, to compliance with the competitive bidding requirements.

The certificate order also provided that the facilities authorized shall not be used for the transportation or sale of natural gas unless Michigan-Wisconsin submits to the Commission within six months of the issuance of the certificate a satisfactory schedule "providing for adequate and reasonable rates and charges consistent with the public interest." (Appendix C, pp. 90-91, par. (B) (vii)). By supplemental order of May 6, 1947, the majority extended the six months to an indeterminate period (Appendix C, p. 227, par. 4). No "satisfactory" schedule has as yet been filed. It is obvious that the Commission could not appropriately find that Michigan-Wisconsin was able to perform the proposed service before acceptable rate schedules were filed, for, *without such data neither the economic feasibility nor the public convenience and necessity of the project could be determined.*

The House Committee report recommending the passage of the amendment made clear the intent of Congress that the rates to be charged by a new pipe line supplier

must be determined *before* the issuance of a certificate. The report stated (at pages 2-3):[33]

> "* * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the * * * characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. Without such authority, the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public was asked to finance the enterprise."

In *Kansas Pipe Line & Gas Company*, 2 F. P. C. 29, 58, the Commission held that it was necessary for applicants for certificates to present schedules of acceptable rates, evidence bearing upon the reasonableness of such rates, the relation of those rates to prospective revenue, and their relation to rates charged by other natural-gas companies operating in the general area or territory affected. This principle was written into the Commission's rules governing certificate cases.[34]

We submit that the issuance of the certificate in the absence of substantial evidence and essential or basic findings to support the conclusion that Michigan-Wisconsin was able properly to perform the service proposed, was without warrant in law. Moreover, the attempt to circumvent the requirements of the statute by attaching condi-

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[33] H. Rept. 1290, House Committee on Interstate and Foreign Commerce, 77th Congress, 1st Session, pp. 2-3. Also see testimony of Commissioner Manly, Hearings on H. R. 5249 before said Committee, 77th Congress, 1st Session, p. 6.

[34] Federal Power Commission General Rules, Including Rules of Practice and Procedure. § 157.6, Exhibits G-4 and G-5, 12 F. R. 8602.

tions which permitted Michigan-Wisconsin to proceed with construction before submitting satisfactory proof of financial ability and rates, was arbitrary and capricious.

C. Even if the issuance of a certificate to Michigan-Wisconsin were warranted, it was error for the Commission to cut the rights of Panhandle in the Detroit and Ann Arbor markets to a volume below that which it is delivering under valid certificates.

The certificate order provides that upon the termination of Panhandle's contracts with Michigan Consolidated (the distributor of gas in Detroit and Ann Arbor) on December 31, 1951, and

> "* * * upon mutually satisfactory terms, Panhandle is afforded reasonable opportunity to deliver and sell to Michigan Consolidated not less than the annual volumes of gas delivered and sold by it for either the years 1942 or 1945 or the average delivered for the five-year period 1942 through 1946. * * * " (Appendix C, pp. 200-201).

Panhandle's sales to the Detroit and Ann Arbor districts amounted to 26,722,346 Mcf.[35] in 1942, 32,539,280 Mcf. in 1945, and an average of 32,436,295 Mcf. for the five-year period 1942-1946 (Appendix C, pp. 104, 197). Therefore, it cannot be determined from the order whether Panhandle will be permitted to deliver the equivalent of the 1942 volume of 26,722,346 Mcf., the higher 1945 volume of 32,539,280, or the average 5-year volume of 32,436,295. In this respect, the order defies understanding. Moreover, it is to be noted that the order contains an escape clause for Michigan Consolidated in that the deliveries must be made upon terms "mutually satisfactory." Here the Commission left Panhandle completely at the mercy of its competitor, Michigan-Wisconsin, and the latter's affiliated distributor, Michigan Consolidated.

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[35] Mcf. represents 1,000 cubic feet.

Apart from these considerations, the so-called determination of Panhandle's rights was unfair and unlawful for the reasons that:

1. Four of the years in the Commission's 5-year so-called "pattern of service" period 1942-1946 were war years when Panhandle's gas sales and capacity were under strict limitation and allocation orders of the War Production Board and it could not obtain sufficient steel and other critical materials required to enable it to meet all the additional demands of customers (Tr. 15186, 15192-3; Appendix C, pp. 123, 146, 160-162).

2. The order attempts to freeze Panhandle into "the precise pattern" of its "prior activities" in violation of the rule enunciated by this Court in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 486-489.

3. During 1946, Panhandle delivered over 39 billion cubic feet to Michigan Consolidated (Appendix C, p. 197). The Commission made it clear that Michigan Consolidated desired to take 127 million cubic feet per day from Panhandle at a 100 per cent load factor basis (46 billion cubic feet per year) during the remainder of the term of the contract, until the end of 1951 (Appendix C, p. 104, par. (3); p. 198, par. (4); Tr. 16915-16917; Exh. 224, p. 14, line 20, p. 48, line 18, Tr. 20241, 20277). It is manifestly unrealistic and unfair in these circumstances to fix Panhandle's rights on the basis of pre-existing "pattern" running back as far as 1942, when the record shows that a substantially different "pattern" existed in 1946, and will exist in 1951.

4. Panhandle has installed, and is operating under outstanding certificates, facilities having capacity to deliver a maximum of 127 million cubic feet per day (46 billion cubic feet per year) to Michigan Consolidated. The orders purport to give Panhandle only an "opportunity" to sell

and deliver between 26 billion and 32 billion cubic feet per year after 1951. This is a drastic cut-back in sales and violates the terms of Panhandle's outstanding certificates, which provide that they "shall be effective so long as applicant continues the operations hereby authorized in accordance with the provisions of the Natural Gas Act * * *" (Tr. 25586-25632). The Commission's action in this regard constitutes a revocation, in substantial part, of Panhandle's outstanding certificates (Appendix C, p. 203). Where, as here, the Act does not specifically authorize revocation in whole or in part, this Court has held such action to be beyond the scope of authority conferred by Congress. *United States and Interstate Commerce Commission* v. *Seatrain Lines, Inc.*, 329 U. S. 424, 432.

The further provision in the Commission's Supplemental Order issued March 12, 1947 (Appendix C, p. 200-1, par. (A)(2)), is simply another attempt "to create an impression of substance out of airy nothing."[36] It provides that:

> "* * * Panhandle shall have the right to participate in the future growth of the Detroit and Ann Arbor markets by being given the opportunity to deliver and sell such additional volumes of gas to Michigan Consolidated *as the latter may require* in excess of the volumes of gas then being contractually purchased by it from Panhandle and Michigan-Wisconsin, in order to maintain adequate service to consumers in the Detroit and Ann Arbor districts."

Since the contract between Michigan Consolidated and its affiliate, Michigan-Wisconsin, contemplates that the entire requirements shall be supplied by Michigan-Wisconsin commencing in 1952, Panhandle will actually have no opportunity to participate in the future load growth of the market so long as Michigan-Wisconsin is able to supply

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[36] This phrase is borrowed from Commissioner Olds' Dissenting Opinion (Appendix C, p. 220).

such needs (Exh. 150, pp. 3, 8, Tr. 17812). Thus, the so-called "opportunity" afforded to Panhandle by the Commission is in fact an obligation to stand by (without compensation) and hold facilities in readiness to serve in the event Michigan-Wisconsin should fail to meet the full requirements of the Detroit and Ann Arbor districts. The Commission's characterization of such obligation as a "right to participate in the future growth" of those markets is sheer obfuscation.

In his second dissenting opinion Commissioner Olds aptly pointed out that the sum and substance of the Commission's action was to permit "*a potential competitor for one of Panhandle's major markets, a creature of the distributing company serving that market, to define the rights of Panhandle Eastern under 'grandfather' and other certificates issued by this Commission under a law enacted by Congress.*" (Appendix C, p. 220).

In affirming the orders of the Commission the lower court erroneously held that

> "the conditions by which the Commission limited its grant to Michigan-Wisconsin did not limit Panhandle to the volume of those years. Condition (2) expressly fixed a minimum for Panhandle, not a maximum." (p. 55, *infra*).

The basic fallacy with the court's reasoning here is that it completely ignored the plain fact that Michigan Consolidated will, of course, purchase the maximum volume of gas from its *affiliated* supplier and only the minimum from Panhandle, a non-affiliate. In other words, the limitation upon Panhandle is not found in a narrow and literal reading of the order, but rather in its practical consequences whereby the Commission placed Panhandle at the mercy of the new pipe line company and its affiliated distributor.

We submit, therefore, that the action of the Commission and court below in cutting the rights of Panhandle in the Detroit and Ann Arbor markets to a volume below

that which it is delivering under valid certificates, was arbitrary, capricious and without warrant in law. Moreover, it results in a taking of Panhandle's property without just compensation and due process of law, in violation of the Fifth Amendment to the Constitution.

2. The United States Court of Appeals for the District of Columbia Has Not Given Proper Effect to Applicable Decisions of This Court.

The court below erroneously held that the Commission did not need to make any findings of financial ability on the part of an applicant for a certificate of public convenience and necessity under the Natural Gas Act (p. 53, *infra*). Concededly, no such finding was made in the case at bar.

We submit that the decision of the court below, that the requirement of Section 7(e) of the Natural Gas Act was satisfied by simply an ultimate finding in the language of the statute that Michigan-Wisconsin is "able and willing properly to do the acts and to perform the service proposed" (p. 53, *infra*), was clearly in conflict with the decision of this Court in *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 532-533. In that case, this Court held that an ultimate finding in the language of the certificate Section 207(a) of the Motor Carrier Act (49 U. S. C. § 307(a)), that "applicant is fit, willing, and able properly to perform the service proposed" is not enough in the absence of a basic finding to support it. This Court required basic findings concerning the applicant's "financial fitness and ability" (page 533 of 327 U. S.). Cf. *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U. S. 626, 634; *State of Florida* v. *United States,* 282 U. S. 194, 215; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 488-489.

Moreover, the court below, in approving the Commission's action in cutting the rights of Panhandle in the De-

troit and Ann Arbor markets to a volume below that which it is delivering under validly outstanding certificates of public convenience and necessity, has not given proper effect to the decision of this Court in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 486-489. The certificate order attempts to freeze Panhandle into "the precise pattern" of its prior activities, in violation of the rule announced by this Court in that case.

Additionally, the Commission's action in this regard amounted to an unlawful revocation, in substantial part, of Panhandle's outstanding "grandfather" and other certificates. The lower court, in disregard of the decision of this Court in *United States and Interstate Commerce Commission* v. *Seatrain Lines, Inc.*, 329 U. S. 424, 432, clearly erred in failing to hold such action to be beyond the scope of the Commission's statutory authority.

3. The Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings, and Has So Far Sanctioned Such a Departure by the Federal Power Commission, as to Call for An Exercise of This Court's Power of Supervision.

The record discloses a consistent pattern of partiality and bias on the part of the majority of the Commission in favor of Michigan-Wisconsin and a course of conduct which impels the conclusion that the majority had prejudged the issues in the case. Such action may be briefly summarized as follows:

1. Two of the majority commissioners "initiated" and held private conferences with counsel and officials of Michigan-Wisconsin in the course of the hearing, in which they pointed out "defects" in the Michigan-Wisconsin case and counselled Michigan-Wisconsin to recede from its "extreme position" and to get together with Panhandle for the purpose of working out a mutually satisfactory agreement upon a division of the Detroit and Ann Arbor markets

(Tr. 14469-14472, 14484, 14487-9, 14498, 14503-6, 14749-14753, 14853-14858).[37]

2. As an outgrowth of these private sessions, an offer was made several days later by the president of Michigan Consolidated to purchase from Panhandle 32 billion cubic feet of gas annually commencing in 1952, at the expiration of the present contract (Tr. 14287-14292, 14315-6). This was followed by the tender of a proposed written contract embodying said offer after the close of the hearing and a request by Michigan-Wisconsin that the Commission postpone its determination of Panhandle's rights so as to give Panhandle an opportunity to act upon the offer while it remained open. Following Panhandle's insistence upon the determination by the Commission of its rights, the majority of the Commission reopened the hearing for the purpose of affording Michigan Consolidated an opportunity to offer the proposed contract in evidence, and at said hearing both counsel for the Commission and Michigan-Wisconsin collaborated in bringing strong pressure to bear upon Panhandle in an effort to force it either to accept the proffered contract or to indicate what kind of contract looking toward a division of the markets would be acceptable, or to suffer the consequences. Upon Panhandle's refusal to accept such proposed contract, the majority accepted as the measure of Panhandle's rights in the Detroit and Ann Arbor markets substantially the volumes which Michigan Consolidated had offered to purchase in said proffered contract. The majority's efforts to coerce Panhandle into accepting the proposed contract are fully discussed and annotated to the record by Commissioner Olds in his second dissenting opinion, under the

[37] These majority commissioners also conferred privately with counsel and officials of Panhandle, and at times with officials of both Panhandle and Michigan-Wisconsin respecting these matters, but no other parties to the proceeding were invited (Tr. Ibid.).

title, *"Record Reveals Pressure to Force Panhandle to Sign Own Warrant"* (Appendix C, pp. 209-217).

3. The majority of the Commission favored Michigan-Wisconsin above all other applicants who had theretofore appeared before the Commission by granting a certificate (a) in the absence of findings and a showing of financial ability or the presentation of a commitment for the financing of the project; and (b) in the absence of a satisfactory schedule of rates and charges. This preferential treatment was a definite departure from the minimum showing required by the Commission of all other applicants under its decisions and rules. (See pp. 29-34, *supra*).

4. The majority of the Commission undertook to decide the case within a deadline imposed upon them by Michigan-Wisconsin, which left insufficient time for the preparation of written and oral argument, the preparation of an appropriate trial examiner's report, proper consideration of the voluminous record, and the preparation of an appropriate order and opinion. The facts in this regard may be briefly summarized as follows:

During the hearing, counsel for Michigan-Wisconsin urged the Commission to speed up the proceeding so as to assure a decision in its favor before December 1, 1946. (Tr. 10007-10024, 10358-60, 11260, 11265-6; Exh. 149, Tr. 17694). At the urgent request of Michigan-Wisconsin, and over the objections of counsel for Panhandle and other parties, the Commission announced, at the conclusion of the evidence at 11 P. M. on November 13, 1946, that oral argument would be heard commencing November 20. It refused to allow for the filing of main and reply briefs or to grant additional time for the preparation of argument (Tr. 15954-15961). However, it permitted the filing of such written statements as could be prepared before the date of oral argument (Tr. 15954-5).

It is obvious that the six days (including Sunday), allowed for the preparation of argument following the con-

clusion of the hearing of evidence, was wholly inadequate in view of the enormous record and the numerous intricate issues of fact and law involved. Moreover, the majority's action in refusing to allow for the preparation and filing of briefs was arbitrary and capricious. Having allowed so little time following the oral arguments within which to examine the record, decide the case and prepare their orders, it seems clear that the majority should have welcomed the assistance of briefs of counsel, had they not already decided to grant the certificate to Michigan-Wisconsin.

The fact that the majority, which did not hear the evidence, undertook to decide the case within only four days following arguments (which were concluded November 26, 1946), without having even allowed sufficient time for the preparation by the presiding trial examiner of an appropriate report, clearly indicates that the majority arrived at their decision without an adequate examination and study of the voluminous transcript of evidence and exhibits.

The action of the majority of the Commission following the conclusion of the case also demonstrates how far they departed from sound administrative procedure. Their initial order of November 30, 1946, was so hastily drawn that it contained no basic findings whatever, leaving the parties completely in the dark concerning how the decision was reached (Appendix C, p. 85). On December 30, 1946, the majority adopted a supplemental order entering some additional findings in an effort to bolster the initial order (Appendix C, p. 99). This was followed by a reopened hearing, Opinions 147 and 147-A, and a further supplemental order (Appendix C, pp. 113, 179, 200), the last of which was issued March 12, 1947, each seeking to justify in retrospect the hasty decision of November 30, 1946. Thus, it took the majority more than three months to determine just why it had decided (in only four days following argument) to grant the certificate to Michigan-Wisconsin.

We submit that this pattern of administrative action was arbitrary and highly prejudicial to Panhandle.[38] Furthermore, it clearly indicates bias and prejudgment on the part of the majority in favor of Michigan-Wisconsin, which resulted in a denial of a fair hearing and due process to Panhandle.

VI.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT P. PATTERSON,
One Wall Street,
New York 5, New York.

JOHN S. L. YOST,
120 Broadway,
New York 5, New York.

D. H. CULTON,
Barfield Building,
Amarillo, Texas.

JOHN W. SCOTT,
HARRY S. LITTMAN,
1025 Vermont Avenue, N. W.,
Washington 5, D. C.
Counsel for Panhandle Eastern Pipe Line Company, Petitioner.

August 30, 1948.

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[38] *Morgan* v. *U. S.*, 304 U. S. 1, 19-20; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304-5, wherein Mr. Justice Cardozo stated: "There can be no compromise [with respect to a fair hearing] on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.....

PANHANDLE EASTERN PIPE LINE COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION; MICHIGAN-WISCONSIN PIPE LINE COMPANY; CITY OF DETROIT, MICHIGAN; MICHIGAN PUBLIC SERVICE COMMISSION; NATIONAL COAL ASSOCIATION; UNITED MINE WORKERS OF AMERICA; LAKE MICHIGAN DOCKS ASSOCIATION; WISCONSIN-UPPER MICHIGAN FUEL DEALERS' ASSOCIATION; SOLID FUEL INSTITUTE OF MILWAUKEE COUNTY; THE ALTON RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Respondents.

MOTION TO DISPENSE WITH PRINTING OF RECORD.

Comes now Panhandle Eastern Pipe Line Company, petitioner herein, and moves this Honorable Court to dispense with printing of the record in this cause in so far as consideration of the petition for certiorari is concerned, and in the event that certiorari is granted, to permit petitioner to file an abbreviated printed record. In support hereof, petitioner respectfully represents that:

I.

Petitioner has this day filed with the Clerk of this Court its petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered June 3, 1948, affirming orders and opinions of the Federal Power Commission under the Natural Gas Act of 1938, as amended (52 Stat. 821; 15 U. S. C. § 717), issuing a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company, respondent.

II.

The certified transcript of the record in this case, including the proceedings before the Federal Power Commission and the United States Court of Appeals for the District of Columbia, has been filed with this Court. Said transcript comprises over 26,000 pages, covers 121 days of hearing before the Federal Power Commission, and includes in excess of 560 voluminous exhibits. The record was not printed in the court below for reasons which may be briefly stated as follows:

Petitioner proposed to file with the court below a printed joint appendix to its brief in accordance with the rules of that court. To that end, it prepared and submitted to counsel for the parties a designation of the material to be printed. Following correspondence and conferences with counsel, petitioner succeeded in entering into a stipulation with all counsel agreeing upon the portions of the transcript to be printed as a joint appendix to petitioner's brief. Said stipulation was filed with the court below on January 22, 1948 (Tr. 26016-26183).

While petitioner was preparing the designation of the portions of the record to be printed, respondent, Michigan-Wisconsin Pipe Line Company, filed in the court below, on November 4, 1947, a motion to dismiss the petition for review, in which said respondent urged that petitioner's contentions were lacking in substance and did not "justify

the time and expense which will be involved in printing and reviewing the entire record". (Tr. 25879-25880). On December 11, 1947 petitioner filed a motion requesting an extension of time to April 1, 1948, within which to file its brief and the printed joint appendix thereto. Michigan-Wisconsin objected to such extension on the ground, among others, that its pending motion to dismiss was:

> "* * * based on a showing that it is unnecessary and would amount to a denial of justice to delay action on the petition for review for the period of many months required to print the voluminous record and to prepare briefs reviewing the entire record".

By order of December 17, 1947, the court below postponed action on petitioner's motion for extension of time within which to file its brief and printed appendix until the date of argument on the motion to dismiss, which was fixed for January 19, 1948 (Tr. 25957). Following said argument, the court below entered a memorandum on February 13, 1948, in which it held that it was unable to rule on the motion to dismiss without reference to the record, and deferred action thereon to the hearing on the merits.[1] Additionally, the court allowed petitioner 25 days within which to file its brief on the merits,[2] and stated that:

> "* * * In order that the case may be heard promptly, the parties are excused from printing the parts of the record which they desire the Court to read. Instead, counsel are requested to take special pains to direct the attention of the Court to the particular pages of the typewritten record which they desire the Court to read in connection with each point presented in their briefs". (Tr. 26184).

Accordingly, the record was not printed in the court below.

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[1] The motion to dismiss was finally denied by order of June 3, 1948 (Tr. 26192).

[2] By order of February 20, 1948, the Court extended the time for filing petitioner's brief to March 27, 1948.

III.

The cost of printing the entire voluminous record of some 26,000 pages, a large part of which is not material to the questions presented by the petition for certiorari, would be a great burden on petitioner. It is believed that the attached brief, which is annotated to the transcript of record and contains a copy of the opinion of the court below, together with printed Appendix "C" to the petition (separately filed herewith), which contains copies of the pertinent orders and opinions of the Federal Power Commission, will enable this Court to pass upon the petition for certiorari without the assistance of a printed record. Upon the granting of certiorari, petitioner represents that it will endeavor with diligence promptly to stipulate with counsel as to printing the portions of the record pertinent to the issues on the merits. Petitioner believes that such procedure will result in a material reduction in the cost of printing, and effect a substantial diminution of the size of the record and a saving of time and effort of this Court.

IV.

WHEREFORE, petitioner respectfully prays that the Court dispense with printing of the record insofar as consideration of the petition for certiorari is concerned, and that, upon the granting of the writ of certiorari, petitioner be

permitted to file an abbreviated printed record in this proceeding.

ROBERT P. PATTERSON,
One Wall Street,
New York 5, New York.

JOHN S. L. YOST,
120 Broadway,
New York 5, New York.

D. H. CULTON,
Barfield Building,
Amarillo, Texas.

JOHN W. SCOTT,
HARRY S. LITTMAN,
1025 Vermont Ave, N. W.,
Washington 5, D. C.
Counsel for Panhandle Eastern Pipe Line Company, Petitioner.

August 30, 1948.

APPENDIX A.

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA.

No. 9588

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

MICHIGAN-WISCONSIN PIPE LINE COMPANY, *Intervenor,*

CITY OF DETROIT, a Municipal Corporation of the State of Michigan, *Intervenor,*

NATIONAL COAL ASSOCIATION and UNITED MINE WORKERS OF AMERICA, *Intervenors.*

LAKE MICHIGAN DOCKS ASSOCIATION, WISCONSIN-UPPER MICHIGAN FUEL DEALERS' ASSOCIATION and SOLID FUEL INSTITUTE OF MILWAUKEE COUNTY, *Intervenors,*

THE ALTON RAILROAD COMPANY, ET AL., *Intervenors,*

MICHIGAN PUBLIC SERVICE COMMISSION, *Intervenor.*

On Petition for Review of Orders of the Federal Power Commission.

Argued May 5, 1948 Decided June 3, 1948

Mr. Robert P. Patterson, with whom *Messrs. John S. L. Yost, John W. Scott* and *Harry S. Littman* were on the brief, for petitioner.

Mr. William Bradford Ross, General Counsel, Federal Power Commission, with whom *Messrs. Louis W. McKernan* and *W. Russell Gorman,* Principal Attorneys, Federal Power Commission, were on the brief, for respondent.

Mr. Thomas J. McGrath, with whom *Mr. Amos M. Mathews* was on the brief, for intervenors The Alton Railroad Company, et al., Lake Michigan Docks Association, et al., and National Coal Association, et al.

Mr. Archie C. Fraser, Assistant Attorney General of Michigan and of the Bar of the State of Michigan, *pro hac vice,* by special leave of court, for intervenor Michigan Public Service Commission. *Mr. Frederick G. Hamley* also entered an appearance for intervenor Michigan Public Service Commission.

Mr. Donald R. Richberg and *Mr. Charles V. Shannon,* with whom *Messrs. Carl I. Wheat, Stanley M. Morley* and *Omar L. Crook* were on the brief, for intervenor Michigan-Wisconsin Pipe Line Company.

Mr. Raymond J. Kelly, Corporation Counsel, City of Detroit, for intervenor City of Detroit. *Mr. James H. Lee,* Assistant Corporation Counsel, City of Detroit, also entered an appearance for intervenor City of Detroit.

Before EDGERTON and PROCTOR, JJ., and MORRIS, District Judge sitting by designation.

EDGERTON, J.: This is a petition by Panhandle Eastern Pipe Line Company ("Panhandle") under § 19(b) of the Natural Gas Act[1] to review orders of the Federal Power Commission authorizing Michigan-Wisconsin Pipe Line Company ("Michigan-Wisconsin") to construct and operate a natural gas pipe line from a point in the Hugoton field in Hansford County, Texas, to the Austin storage field in Michigan, and also a branch line from a point in Illinois into Wisconsin, for the purpose of supplying natural gas to various communities in Wisconsin, Iowa, Missouri, and Michigan. Two Commissioners dissented.

The largest market to be served is the Detroit-Ann Arbor area in Michigan. Natural gas is now brought into that area only by Panhandle. The local distributor there,

[1] 52 Stat. 821, 831, 15 U. S. C. § 717r(b).

Michigan Consolidated Gas Company, and Michigan-Wisconsin are under common control.

The Commission made the following findings among many others. "Applicant [Michigan-Wisconsin] proposes to serve natural gas in areas within the State of Wisconsin where a substantial demand for such service exists, no other application for authority to render such service being now before this Commission. Applicant also proposes to add greatly to the supplies of natural gas available for service within the State of Michigan where a demand for such enlarged service has also been demonstrated, no other application for the adequate augmentation of presently available supplies to meet such market requirements being now before this Commission." "The consuming public in Detroit and elsewhere has . . . been unable to receive natural gas in sufficient volume to meet its needs and desires by reason of the inability of distributing companies to obtain adequate quantities of such gas. . . . The deficiency is becoming constantly greater." . . . Although Panhandle "has applied for and received in a related case . . . authority for somewhat enlarged facilities which will enable it to increase to some extent its deliveries to said markets in Michigan, *inter alia*, it has not applied for sufficient facilities nor demonstrated its ability to serve adequately the needs of these markets in addition to the expanding requirements of those which it enjoys in the other areas which it supplies in Indiana, Illinois and Missouri." This latter finding of the Commission plainly means that any large increase in the volume of natural gas supplied by Panhandle in Detroit-Ann Arbor might be at the expense of other communities. On the other hand, approval of Michigan-Wisconsin's application will benefit not only Detroit-Ann Arbor but other communities as well: the Commission found that "a combined population of more than 1,388,000 people will for the first time secure the benefits to be derived from the introduction of natural gas service in the communities in Wisconsin, Iowa and Missouri" that Michigan-Wisconsin proposes to reach. Even in the Detroit-Ann Arbor area itself, entry of Michigan-Wisconsin will have advantages over service, however expanded, by Panhandle alone. It will result in competition there, and will also make "available to the Michigan market an alternative service and supply of natural gas from the area of the largest gas reserves in the United States. That such an independent additional and reliable source of supply will be of great value to the

area to be served and benefit public convenience and necessity admits of no doubt."

We think these and other findings are supported by substantial evidence and support the Commission's conclusion that the Michigan-Wisconsin project is, in the words of §7(e) of the Natural Gas Act, required by "public convenience and necessity." Even if some of the findings were unsupported, the orders under review should be affirmed "since, without such findings, there would still be a basis in the record for the [Commission's] conclusions."[2]

The Commission found that Michigan-Wisconsin is "able and willing properly to do the acts and to perform the service proposed." This finding, like that of public convenience and necessity, is expressly required by §7(e) of the Act. We think it is also supported by substantial evidence. Panhandle says it is not supported by findings or proof of financial ability or a satisfactory rate schedule. The Act does not require such findings. The Commission did find, on sufficient evidence, that Michigan-Wisconsin "has secured substantial reserves of natural gas and has submitted reasonable proof of the financial and economic feasibility of its project." Sec. 7(e) of the Act expressly authorizes the Commission to attach reasonable conditions "to the issuance of the certificate and to the exercise of the rights granted thereunder." The Commission attached the condition that Michigan-Wisconsin "shall obtain approval of its proposed plan of financings by the Securities and Exchange Commission . . ." because the parent company, American Light and Traction Company, was a regulated holding company and therefore no definite commitment for financing was possible without such approval. This was both practical and legal. Congress has not confronted the two Commissions with a dilemma like that created by the famous municipal ordinance requiring that when two trains approach a grade crossing at the same time, both shall stop and neither shall proceed until the other has proceeded. The Commission also provided that the authorized facilities "shall not be used for the transportation or sale of natural gas subject to the jurisdiction of the Commission until Applicant submits to this Commission a schedule of rates and charges in a form satisfactory to this Commission providing for adequate and reason-

[2] *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 247.

able rates and charges consistent with the public interest." The Act does not require, and because of changing costs it would be illusory to require, that rates be fixed before construction begins.

Panhandle says there were no findings or proof that it was unable or unwilling to supply the present and future requirements of the Detroit and Ann Arbor markets. We think findings to substantially that effect, supported by proof, are included among those we have quoted above.[3] We also think such findings unnecessary. Detroit and Ann Arbor are not the only markets involved. The Commission rightly took into account the interests of other communities now served by Panhandle and of still others that will be served by Michigan-Wisconsin. Even apart from such interests, nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply. No such privilege can be reconciled with the general mandate in § 7(e) of the Natural Gas Act that "a certificate shall be issued to any qualified applicant . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service . . . is or will be required by the present or future public convenience and necessity."[4] Any such privilege is specifically negatived by § 7(g), which provides that "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."[5]

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[3] The Commission's statement that Panhandle "has expressed a willingness to meet the enlarged requirements of said local markets" does not mean that Panhandle had proposed to the Commission a plan that would actually meet their actual requirements. So interpreted, the statement would contradict its context.

[4] 56 Stat. 84, 15 U. S. C. § 717f(e). *Cf. United States* v. *Pierce Auto Lines*, 327 U. S. 515, 530-532; especially footnote 20, where the Court says: "The [Interstate Commerce] Commission has recognized the value of reasonable competition."

[5] *Cf. Kentucky Natural Gas Corp.* v. *Federal Power Commission*, 159 F. 2d 215 (C. C. A. 6th).

Panhandle says that even if the issuance of a certificate to Michigan-Wisconsin were warranted, it was error "to cut the rights of Panhandle in the Detroit and Ann Arbor markets to a volume below that which it is delivering under valid certificates." We do not find that this was done. The Commission said: "although Panhandle has no exclusive right to serve a market for all time and thus claim a monopoly, . . . there is no intention on the part of the Commission herein to modify, terminate or set aside any certificate heretofore issued by the Commission to Panhandle." The Commission even imposed upon its grant to Michigan-Wisconsin these express "terms and conditions" for the affirmative protection of Panhandle: "(1) That Panhandle is permitted to deliver natural gas to Michigan Consolidated in accordance with the terms and conditions of its existing contracts during the life of such contracts, and (2) That upon the termination of such contracts, and upon mutually satisfactory terms, Panhandle is afforded reasonable opportunity to deliver and sell to Michigan Consolidated *not less than*[6] the annual volumes of gas delivered and sold by it for either the years 1942 or 1945 or the average delivered for the five-year period 1942 through 1946. Further, Panhandle shall have the right to participate in the future growth of the Detroit and Ann Arbor markets by being given the opportunity to deliver and sell such additional volumes of gas to Michigan Consolidated as the latter may require in excess of the volumes of gas then being contractually purchased by it from Panhandle and Michigan-Wisconsin, in order to maintain adequate service to consumers in the Detroit and Ann Arbor districts." Panhandle points out that it sold more gas in 1946 than in the previous years to which the Commission referred. But the conditions by which the Commission limited its grant to Michigan-Wisconsin did not limit Panhandle to the volume of those years. Condition (2) expressly fixed a minimum for Panhandle, not a maximum.[7]

We find no adequate basis for Panhandle's criticism of the procedure that was followed or its charge of bias against certain members of the Commission.

Affirmed.

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[6] Italics supplied.

[7] Moreover the Commission's order as we read it reserved to the parties including Panhandle the right to file applications at any time, and from time to time, for modification or termination of the conditions.

APPENDIX B.

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C. §§ 717, *et seq.*), as amended by the Act of February 7, 1942, 56 Stat. 83 (15 U. S. C. § 717f), are as follows:

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * * *

SECTION 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas

company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commisson, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was *bona fide* engaged in transporation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may

issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) [1] When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

SECTION 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this act.

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[1] Act of July 25, 1947 (Public Law 245, c. 333, 80th Congress, 1st Session).

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the

court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.